Supreme Court, U.S.
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No. 81-1036

In the Supreme Court of the United States

October Term, 1981

EDGAR CLEVELAND, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972 to September 1, 1972,
Petitioners,

vs.

CLARENCE PALMBY; CONTINENTAL GRAIN COMPANY; CARGILL, INCORPORATED; LOUIS DREYFUS CORPORATION; COOK INDUSTRIES; GARNAC GRAIN COMPANY; and BUNGE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Are American wheat farmers who sold their wheat crop at prices severely depressed as a direct result of a price fixing conspiracy of six international grain exporters barred from recovery under Section 4 of the Clayton Act simply because they sold their wheat to independent country elevators instead of elevators owned by grain exporters?

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No.

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EDGAR CLEVELAND, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972 to September 1, 1972,
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CLARENCE PALMBY; CONTINENTAL GRAIN COMPANY; CARGILL, INCORPORATED; LOUIS DREYFUS CORPORATION; COOK INDUSTRIES; GARNAC GRAIN COMPANY; and BUNGE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, an Oklahoma wheat farmer, petitions this Court to issue a Writ of Certiorari to review the decision of the Court of Appeals for the Tenth Circuit that denied standing under Section 4 of the Clayton Act to Petitioner and to other wheat farmers similarly situated.

OPINIONS BELOW

The opinion of the Tenth Circuit, filed on August 6, 1981, is reported at 1981-2 Trade Cases ¶64,208 (10th Cir. 1981), and is reproduced as Appendix A to this petition. The Opinion on Petition For Rehearing and Suggestion For

Hearing En Banc, filed on September 4, 1981, not officially reported, appears as Appendix B. There are two opinions of the United States District Court for the Western District of Oklahoma that were reviewed by the Tenth Circuit. The first opinion, dated June 25, 1979, appears as Appendix C; and the second opinion, dated November 13, 1979, appears as Appendix D to this petition.

JURISDICTION

The opinion of the Tenth Circuit sought to be reviewed was filed on August 6, 1981; and that Court's order denying petition for rehearing was filed on September 4, 1981. Jurisdiction to review the judgment of the Tenth Circuit is conferred on this Court by 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 4, Clayton Act, 15 U.S.C. §15:

> "Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

This is a private antitrust case filed on behalf of Oklahoma wheat farmers who suffered injury as a direct result of defendants' conspiracy to fix the market price of wheat. The principal objective of the conspiracy was to keep the market price of wheat sufficiently depressed so that farmers would release their new crop on the open market at a time when there was a significant increase in market demand.

At a time when market demand for wheat experienced a sharp increase caused by the historic sale of wheat to Russia in 1972, the defendant grain export companies were able to keep market prices artificially depressed as a result of their conspiracy. This was accomplished by their conspiracy to suppress market information; filing false reports with federal agencies; gaining control of transportation by cornering the market of railroad cars. As a result of this activity, market reports relied upon by farmers were distorted.

The Oklahoma wheat farmers relied on false market data and sold their wheat at depressed prices. Price fixing, in any form, has long been held illegal *per se* under Section 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, ... U.S. ....., 100 S.Ct. 937 (1980).

Once a farmer either places his new wheat harvest in storage or sells it on the open market, the wheat loses its identity; it is commingled with all the other wheat that is in the country elevator. Under ordinary circumstances, a farmer stores his wheat if the market price is expected to increase. He sells his wheat if the market is steady or on a decline. During the summer of 1972, the conspiracy

of the defendant grain companies created the false impression that the market price was on a decline. Consequently, farmers sold their wheat.

Wheat is sold at harvest time to the local country elevator which may be owned by a farmers' cooperative; owned by an independent company; or owned by one of the large corporate grain export companies such as the defendants in the present case. Regardless of the ownership of the elevator, the price received by the farmer is set by the forces of the general commodity markets.

In 1972, this private antitrust suit was filed against the grain exporting companies on behalf of all Oklahoma wheat farmers. The action was filed under Section 4 of the Clayton Act, 15 U.S.C. §15; the District Court had jurisdiction under 28 U.S.C. §1337. On June 30, 1975, the lower court certified the case as a class action with approximately 43,000 Oklahoma farmers as members.

But, on June 25, 1979, the class was decertified and dismissed on the basis of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Claims of Oklahoma wheat farmers who sold their wheat to country elevators owned by one of the defendant grain export companies were dismissed without prejudice.[1] Claims of wheat farmers who sold to country elevators operated by farmer cooperatives or owned by private persons were dismissed with prejudice.

The Tenth Circuit affirmed the District Court's decision.

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1. On June 25, 1980, a new antitrust action was filed on behalf of those Oklahoma wheat farmers who sold wheat to elevators owned by one of the grain export companies. *Barr, et al. v. Clarence Palmby, et al.*, Civ. 80-758-D, W.D. Oklahoma. This was filed as a class action with an estimated number of 20,000 wheat farmers. The lower court has, however, refused to certify this class. It is realized that this order is not subject to review at this time; however, it is a fact that is essential to establishing an accurate perspective of what Oklahoma wheat farmers have faced.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals for the Tenth Circuit Has Decided an Important Federal Antitrust Question in a Way That Conflicts With Applicable Decisions of This Court

The Court below expanded and seriously misapplied *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) with the effect of emasculating our "strong national interest in antitrust enforcement". *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 (1977); *United States v. Topco Associates*, 405 U.S. 596, 610 (1972). If allowed to stand, the decision below will create major problems of judicial administration with an effect of weakening a Congressional policy favoring private enforcement of the federal antitrust laws.

This Congressional policy forms the basis for this Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) which was symmetrically applied in *Illinois Brick*. The Court below went against this policy.

A. Illegal Fruits: In *Hanover Shoe*, this Court adopted a policy that allowed a direct purchaser to recover the full amount of price overcharge, even though at least part of the overcharge was passed on to indirect purchasers. This was in the interest of a vigorous private antitrust enforcement policy. But it was also aimed at preventing antitrust violators from retaining "the fruits of their illegality". *Hanover Shoe*, 392 U.S. at 494; *Illinois Brick*, 431 U.S. at 746.

Opposition to duplicate recoveries was expressed in *Illinois Brick;* however, nothing in that decision suggested that this Court favored unjust enrichment of antitrust vio-

lators. Yet this is the effect of the decision below. If standing under the antitrust laws is denied wheat farmers, the antitrust violaters who conspired to depress the market price will be unjustly enriched. There is no one else who can pursue the present antitrust claim. The injury was aimed directly at the farmers; and it is there that it came to a rest. In fact, American wheat farmers have little control over market prices which are set by the activity of the grain companies in the commodity board of trades.

Interestingly, the American farmers, with their granger movement, played a major role in persuading Congress to enact the Sherman Antitrust Act in 1890. This first antitrust statute allowed for private treble damage suits; and Senator George recognized that farmers and consumers had standing under this statute. 21 Cong. Rec. 3150 (1890). But Senator George recognized that these parties have to face large corporations with unmatched economic power. 21 Cong. Rec. 3150 (1890).

American farmers now petition this Court for their rights under the antitrust laws. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the rights of basic consumers were recognized. It is only reasonable to likewise grant access to the courts to all basic dirt farmers who have suffered direct injury as a result of the unlawful activity of large and powerful corporations.

B. Implied Antitrust Immunity: This Court has consistently recognized that immunity from the federal antitrust laws is not lightly implied; and that repeal by implication is strongly disfavored. *National Gerimedical Hospital & Gerontology v. Blue Cross*, ... U.S. ....., 101 S.Ct. 2415 (1981); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, ... U.S. ....., 100 S.Ct. 937 (1980); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Illinois Brick*

Co. v. Illinois, 431 U.S. 720 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 723 (1975); *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975); *United States v. First City National Bank of Houston*, 386 U.S. 361 (1967).

In spite of this clear position, the court below has granted immunity to the giant grain exporting companies. These companies are now free to manipulate the commodities market through conspiratorial activity aimed at depressing the price received by farmers. A case involving commodity market manipulation is presently before this Court. *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *cert. granted*, ... U.S. ....., 101 S.Ct. 1346 (1981).

The antitrust immunity granted by the lower court to the grain exporters results from an unreasonable extension of *Illinois Brick*. Support for this extension was *In Re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, ... U.S. ....., 101 S.Ct. 280 (1981). Reliance on this case, however, is misplaced.

Although the Fifth Circuit, in the *Beef Industry* case, applied *Illinois Brick* to indirect sellers, the claims of those indirect sellers were not dismissed. The indirect sellers were allowed to pursue their claims through the cost-plus exception of *Illinois Brick*. There was no immunity granted to the defendants in that case; and the plaintiffs suffered no injury.

In the present case, however, the antitrust violators are rewarded by the decision of the court below that barred all recovery by the injured wheat farmers. The giant grain exporters were permitted to reap vast profits at the sole expense of the farmers. Surely this Court will not allow such an injustice to stand.

C. Symmetrical Application of *Hanover Shoe*: In *Illinois Brick*, this Court made it clear that it was doing no

more than making a symmetrical application of *Hanover Shoe*. Each of these cases involved the effects of passing on higher prices from a direct purchaser to an indirect purchaser. For there to be a symmetrical situation, there had to be a passing on of higher prices. Two basic reasons were given for the *Illinois Brick* conclusion. There was first the fear of multiple liability of the defendants. 431 U.S. at 730.

If the direct purchaser, under *Hanover Shoe*, is allowed to recover the full amount of the overcharge, subsequent suits filed on behalf of indirect purchasers to whom the higher price was passed would result in double recovery. To avoid this inequity, this Court could have overruled or modified *Hanover Shoe*. Standing of direct and indirect purchasers could have been approved with an apportionment of damages formula. But this, according to the reasoning of this Court, would "add whole new dimensions of complexity to treble-damages suits and seriously *undermine their effectiveness*". 431 U.S. at 737 (Emphasis added).

There is no risk of multiple liability to the defendants in the present case since wheat farmers were incapable of passing on their injury to any other person. The farmers share their injury with no one. All persons buying from the farmers at prices depressed as a result of an antitrust conspiracy actually benefit whether or not they are part of the conspiracy. Consequently, there is no apportionment of damages that would add to the complexity of treble damage suits.

Illinois Brick simply has no symmetrical application to the present case. In its decision below, the Tenth Circuit expanded *Illinois Brick* by its generalized interpretation that:

> "From *Illinois Brick*, we learn that in an antitrust treble damage case involving price-fixing the plaintiff must have dealt directly with the alleged violator." (Appendix A at p. A11).

This Court did not make such a broad pronouncement in *Illinois Brick*.

D. *Illinois Brick* Exceptions: If *Illinois Brick* is to be applied to seller cases, this writ should be granted because the Court below did not follow this Court's decision as applied to the recognized exceptions in *Illinois Brick*. Besides the cost-plus exception, this Court also recognized an exception where "the direct purchaser is owned or controlled by its customers". 431 U.S. at 736 fn. Under these facts, the indirect purchaser would have standing to file an antitrust claim. If *Illinois Brick* is to be applied to seller cases, this "controlled" exception should also apply.

An effort was made in the court below to fit the named plaintiff within this exception. The trial court, however, ruled that this exception did not apply since the incorporated farmer cooperative was "a legal entity separate and apart from its members". Appendix C, p. A24. The Tenth Circuit made no finding on this issue except to rule that: "In all other regards, the judgment is affirmed". Appendix A, p. A16.

Many wheat farmers sold their wheat to farmer cooperatives which are owned by the farmers. Wheat sales through farmer cooperatives should fall within the exception recognized by this Court.

II

The Decision Below Conflicts With Decisions of Other Federal Circuits

Not only is the decision below in direct conflict with decisions of other federal circuits, the Tenth Circuit stands

alone in its expansion of *Illinois Brick*. The opinion below conflicts with the following decisions: *In Re Fine Paper Litigation State of Washington*, 632 F.2d 1081 (3d Cir. 1980); *In Re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, ... U.S. ....., 101 S.Ct. 280 (1981); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980).

Only on the surface is the decision below consistent with the *Beef Industry* case. Each Circuit applied *Illinois Brick* to a seller case. But there is a conflict between these two Circuits in the application of the cost-plus exception. The Tenth Circuit ruled that this exception to *Illois Brick* should be narrowly applied in spite of the fact that the antitrust violators would be enriched. Appendix A, p. A13.

The Fifth Circuit, on the other hand, reversed the trial court's dismissal of antitrust claims filed by indirect sellers of beef. Standing of cattle ranchers who suffered injury similarly to that suffered by the wheat farmers was upheld on a liberalized reading of the cost-plus exception. The Fifth Circuit stated:

> "As we understand these cases, the Court meant the scope of the exception to be narrow, but it did not imply that only cases involving cost-plus contracts qualify." 600 F.2d at 1163.

In *Beef Industry*, the Court adopted a standard of "functional equivalent of the cost-plus contract case". 600 F.2d at 1163. It reasoned that the cost-plus exception must be read and applied in light of the objectives expressed by this Court in *Illinois Brick*. The cost-plus issue in the present case was resolved without any significant analysis. The Tenth Circuit stated:

"In our view, any exception should not be given an expansive application, lest it swallow the rule and become the rule itself." Appendix A at p. A13.

The conflict between the present case and *Beef Industry* is dramatically reflected in the bottom line of each case - Cattle ranchers were granted standing to pursue their antitrust claim; but wheat farmers were denied standing. This conflict becomes more startling when viewed in light of the basic facts of each case.

In *Beef Industry*, the alleged price fixing conspiracy of large grocery retail chains was aimed at depressing the price of beef at the wholesale level. An instrument of this conspiracy was a "price reporting publication". The depressed market price paid by the retailer to the wholesaler was passed on to the cattle rancher.

A significant factual difference in the present case is that the conspiracy of the grain exporters was aimed directly at the wheat farmer. One object of the conspiracy was to keep the price of wheat low. But another and perhaps the main object was to make it economically unprofitable for the farmers to hold on to their 1972 wheat harvest. It was essential to the grain exporters that the wheat farmers release their wheat on the market in order that the wheat sold to Russia could be supplied.

There was no one below the farmer to which the depressed prices could be passed. The injury stopped at the very target of the conspiracy.

Conflict created between the Tenth Circuit in the present case and decisions of the Third, Seventh and Ninth Circuits involves the proper approach to *Illinois Brick*. In the present case, the lower court made an almost mechanical application of *Illinois Brick* with a conclusion that indirect sellers are the same as indirect purchasers.

No consideration was given to the philosophy of *Illinois Brick* which is consistent with a policy in favor of vigorous antitrust enforcement.

In *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), the court allowed indirect purchasers to sue in a situation where "as a practical matter the direct purchasers . . . will never sue". 621 F.2d at 327. According to this court, a blind application of *Illinois Brick* "would close off every avenue for private enforcement of the antitrust laws". 621 F.2d at 327. "This", observed the court, "would be intolerable". 621 F.2d at 327. Consistent with the Ninth Circuit is *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); and *In Re Fine Paper Litigation State of Washington*, 632 F.2d 1081 (3d Cir. 1980).

The Tenth Circuit, on the other hand, disregarded the objectives and philosophies in *Illinois Brick*. *Illinois Brick* was blindly applied in the present case regardless of the absence of any possibility of multiple liability. In *Illinois Brick*, this Court stated:

> "We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws . . . supports our adherence to the *Hanover Shoe* rule. . . ." 431 U.S. at 745.

The Court further stated in *Illinois Brick*:

> "Section 4 has another purpose in addition to deterring violators and depriving them of 'the fruits of their illegality' . . .; it is also designed to compensate victims of antitrust violations for their injuries." 431 U.S. at 746.

Most Federal Circuits and their lower courts are approaching and applying *Illinois Brick* in a rational manner

consistent with this Court's ruling and this Court's stated antitrust policy. In the opinion below, the Tenth Circuit has materially deviated from these standards and has created a serious conflict among the Circuits.

The decision of the Tenth Circuit also places in doubt many Federal District Court decisions in which *Illinois Brick* has been more cautiously applied. Absent any probable duplicate recovery of damages, one of the bases for *Illinois Brick*, the District Courts are generally refusing to dismiss private antitrust claims. *In Re Uranium Antitrust Litigation*, 473 F. Supp. 393 (N.D. Ill. 1979); *Hecht Co. v. Southern U. Co.*, 474 F. Supp 1022 (D. N.M. 1979); *In Re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072 (N.D. Calif. 1979); *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979); *Nationwide Mutual Insurance Co. v. Automotive Service Councils of Delaware*, 490 F. Supp. 282 (D. Del. 1980); *Vermont Intern. Petroleum Co. v. Amerada Hess Corp.*, 492 F. Supp. 429 (N.D. N.Y. 1980); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1246 (E.D. Pa. 1980); *Pollock v. Citrus Associates of the New York Cotton Exchange*, 512 F. Supp. 711 (S.D. N.Y. 1981).

In the *Zenith Radio* case, an extremely well reasoned and written analysis of the application and limitations of *Illinois Brick*, Judge Edward Becker applied *Illinois Brick* in accordance with the fundamental purpose of *Illinois Brick* and *Hanover Shoe*. This is consistent with all of the Federal Circuits with the exception of the Tenth Circuit.

As long as the opinion below remains standing, farmers and cattle ranchers within the jurisdiction of the Tenth Circuit are placed at the mercy of large corporate food processors. These corporations are free to actively partici-

pate in conspiracies to keep farm prices depressed. As long as they do not buy directly from farmers, they can continue their conspiracy with impunity.

This was surely not the intent of this Court's *Illinois Brick* decision. To correct the incredible error of the Tenth Circuit, this Court should grant certiorari.

CONCLUSION

Based upon the above stated reasons, this Court is urged to grant certiorari. This writ is essential to correct a serious and material deviation from applicable decisions of this Court. It is also essential to correct a conflict among Federal Circuits.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed August 6, 1981)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Appeal from the United States District Court for the Western District of Oklahoma

(D.C. No. CIV 73-779-D)
NO. 79-2296 (Consolidated)
(D.C. No. CIV 73-780-D)

JOE ZINSER, et al.,
Plaintiffs-Appellants,

v.

CONTINENTAL GRAIN COMPANY, et al.,
Defendants-Appellees.

JOHN SPEARMAN, et al.,
Plaintiff-Appellants,

v.

CONTINENTAL GRAIN COMPANY, et al.,
Defendants-Appellees.

NO. 79-2310
(D.C. No. CIV 72-731-D)

EDGAR CLEVELAND, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972 to September 1, 1972,
Plaintiffs-Appellants,

v.

CLARENCE PALMBY; CONTINENTAL GRAIN COMPANY; CARGILL, INCORPORATED; LOUIS DREYFUS CORPORATION; COOK INDUSTRIES; GARNAC GRAIN COMPANY; and BUNGE CORPORATION,
Defendants-Appellees.

Joseph Alioto of Alioto & Alioto, San Francisco, California (James W. Witherspoon, Earnest L. Langley, Marion J. Craig III, and James E. Elliott of Witherspoon, Aiken & Langley, Hereford, Texas; and Michael T. Garrett of Law Offices of Michael T. Garrett, Clovis, New Mexico, with him on the brief), for Plaintiffs-Appellants in No. 79-2296; and (Frank Gregory, Tulsa, Oklahoma, and John M. Merritt of John M. Merritt, Inc., Oklahoma City, Oklahoma, for Plaintiffs-Appellants in No. 79-2310).

Mark H. Alcott (Simon H. Rifkind, Arthur L. Liman, and Lewis R. Clayton of Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York; Judson S. Woodruff, Peter B. Bradford, John N. Hermes, and Lou Ann Ables of McAfee & Taft, Oklahoma City, Oklahoma; Neal R. Allen of Culton, Morgan, Britain & White, Amarillo, Texas, Attorneys for Defendant-Appellee Continental Grain Company; and Robert J. Emery

and James M. Gaitis of Robert J. Emery & Associates, Oklahoma City, Oklahoma, Attorneys for Defendant-Appellee Clarence D. Palmby, on the brief).

Before SETH, Chief Judge, and McWILLIAMS and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

These three antitrust cases were brought by wheat farmers in Oklahoma, Texas, and New Mexico against six grain export companies and a former governmental official. The two defendants named in all three complaints are Continental Grain Company, a Delaware corporation with its principal place of business in New York City, and Clarence D. Palmby, a former Assistant Secretary of the United States Department of Agriculture.[1] The central issue in these consolidated appeals is the applicability of Illinois Brick Co. v. Illinois, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977). The trial court ruled that *Illinois Brick* controlled and dismissed all three actions. The plaintiffs appeal.

The three complaints with which we are concerned were filed between October, 1972, and January, 1973, in

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1. The other five grain companies, named as defendants in only one of the three cases, are Cargill, Inc.; Louis Dreyfus Corp.; Cook Industries, Inc.; Garnac Grain Co., Inc. and Bunge Corp. These companies are named as defendants in the case in which Edgar W. Cleveland, an Oklahoma wheat farmer, is the named plaintiff representing Oklahoma wheat farmers. *See* note 3 *infra*.

Continental Grain and Clarence D. Palmby, former Assistant Secretary of the United States Department of Agriculture, were named as defendants in all three cases. A central allegation is that Palmby, who was hired by Continental after the grain sales were completed, was bribed by Continental. According to the plaintiffs' theory, Palmby exchanged confidential government information about the grain sales for a position with Continental.

the United States District Courts for the Western District of Oklahoma and the Northern District of Texas. In November, 1973, the cases were consolidated for pretrial proceedings in the Western District of Oklahoma by order of the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407 (1976). In re Wheat Farmers Antitrust Class Action Litigation. 366 F.Supp. 1087 (J.P.M.L. 1973).[2]

The trial court on June 30, 1975, certified three classes, consisting of wheat farmers who had sold wheat on the open market from May 1, 1972, until September 1, 1972, in the following geographic areas: (1) the state of Oklahoma (the Cleveland case); (2) thirty-four counties in the Northern Panhandle region of the state of Texas (the Zinser case); and (3) Curry County, New Mexico (the Spearman case).[3]

The three complaints here involved are almost identical in their content. In each instance the action was instituted under the authority of sections 4 and 12 of the Clayton Act,

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2. In addition to the decision consolidating these cases, there have been two other published opinions during the nine-year history of this litigation. In re Wheat Farmers Antitrust Class Action, 440 F. Supp. 1022 (D.D.C. 1977), was a case in which Judge Sirica considered a motion to produce certain documents, which the Government claimed were classified and subject to a claim of executive privilege. Cleveland v. Palmby, 75 F.R.D. 654 (W.D. Okla. 1977), dealt with the taking of a deposition of an employee of defendant Cook Industries, Inc.

3. The three cases were:

(1) Cleveland v. Palmby. Named Plaintiff Edgar W. Cleveland represented a class of about 43,000 Oklahoma wheat farmers. In addition to Continental and Palmby, there were five other grain companies which were named as defendants. *See* note 1 *supra*.

(2) Zinser v. Continental Grain Co. Named Plaintiff Joe Zinser represented a class of about 12,000 wheat farmers in thirty-four designated counties in the Panhandle and adjacent areas of north Texas.

(3) Spearman v. Continental Grain Co. Named Plaintiff John Spearman represented between 600 and 1,500 wheat farmers in Curry County, New Mexico.

15 U.S.C. §§ 15 and 22 (1976) to recover treble damages for violations of the antitrust laws. Cleveland alleged only antitrust violations under section 1 of the Sherman Act, 15 U.S.C. § 1. Zinser and Spearman alleged violations under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1976).[4]

The central allegation of all three complaints is that Continental Grain Company and Clarence Palmby, and others, conspired in 1972 to suppress information regarding impending wheat sales to the Soviet Union. The plaintiffs' theory of the case is that this conspiracy resulted in a depressed market condition, thereby allowing Continental Grain, and other grain exporters, to buy wheat from "middlemen"[5] at lower prices than would have been the case if the information had not been suppressed. According to the complaints since the middlemen sold wheat to the grain exporters at lower prices than would have been paid if the information about forthcoming sales to the Soviet Union had been publicly known, the middlemen, in turn, purchased wheat from the wheat farmers at reduced prices. It was on this general theory that the plaintiffs claimed antitrust violations and treble damages.

Needless to say, there was extensive discovery. It eventually developed during the course thereof that none of the three named plaintiffs sold any wheat directly to any defendant during the time period here involved. Instead, each sold to a middleman, who in turn sold to Continental

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4. The injury complained of was the same in each instance, i.e., that, because of the alleged conspiracy, the plaintiffs sold their wheat at artificially depressed prices. In practical effect, all of the claims amount to contentions that, because of the defendants' actions, prices were fixed at artificially low levels, thereby benefitting the defendants to the detriment of the several plaintiffs.

5. Middlemen include such entities as county grain elevator companies and farmer co-operatives.

Grain, or some other grain exporter. Furthermore, discovery also disclosed that the vast majority of the class members did not sell to any defendant, but rather sold their wheat to middlemen, who, in turn, sold either to someone else in the distribution chain, or to one of the defendants. In fact, not more than ninety-two members of the Cleveland class, consisting of 43,000 Oklahoma farmers, sold directly to Continental; not more than 212 members of the Zinser class, consisting of 12,000 Texas farmers, sold to Continental; and only sixty-two members of the Spearman class of between 600 and 1,500 New Mexico farmers sold directly to Continental.[6]

As mentioned, the instant cases were instituted in 1972 and 1973, and were certified as class actions in 1975. Discovery continued unabated throughout this time, and after. Then, on June 9, 1977, the Supreme Court announced its decision in *Illinois Brick*. In order to allow the parties an opportunity to consider the applicability of *Illinois Brick*, the trial court granted an extension of time to permit additional discovery and submission of briefs on the matter. The trial court also held a hearing at which counsel presented their respective positions on the matter. Finally, on June 25, 1979, the trial court entered an order holding that *Illinois Brick* applied to the instant cases and was in fact dispositive thereof. More specifically, the trial court held that *Illinois Brick* precluded an antitrust action by one who was only an "indirect seller" to the defendants, an "indirect seller" being one who did not deal directly with any defendant, but rather sold his wheat to a middleman who, in turn, sold either to a defendant or to some other link in the distribution chain.

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6. These numbers were supplied by counsel for Continental at the request of the District Court. The information was taken from Continental's records.

As above indicated, none of the three class representatives, *i.e.*, Cleveland, Zinser, or Spearman, sold his wheat directly to any defendant, and there were only a total of not more than 366 farmers in all three classes who sold their wheat directly to the defendants. The trial court found that, under the circumstances, a continuation of the class actions was not warranted. Accordingly, with the three class representatives unable to proceed further under *Illinois Brick*, the trial court, applying Fed. R. Civ. P. 23(a), declined to recertify the classes. The trial court then dismissed all actions "without prejudice."

Both the plaintiffs and defendants filed timely motions under Fed. R. Civ. P. 59. These motions were disposed of by order on November 13, 1979. In that order the trial court adhered to its earlier ruling that *Illinois Brick* barred recovery by all persons who did not sell their wheat directly to one of the defendants during the pertinent time frame. The trial court also adhered to its earlier ruling that, all factors considered, those relatively few farmers who had sold their wheat directly to one of the defendants during the pertinent time period would not be allowed class certification.

Numerous matters not referred to in the trial court's order of June 25, 1979, were raised by the Rule 59 motions and disposed of in the order of November 13, 1979. Specifically, the several plaintiffs sought leave to amend their pleadings so that the actions could proceed as ones based on fraud and deceit and civil conspiracy, with jurisdiction based on diversity. The trial court denied this request on several grounds, the primary one being that the request to amend came "too late," namely, some seven years after commencement of the litigation, and that the cases from their inception were based on alleged antitrust violations. In the same vein, the trial court noted that even after

Illinois Brick was announced, the plaintiffs made no effort to amend until the trial court determined that *Illinois Brick* barred the present proceeding. The trial court also declined to award the plaintiffs their costs or attorney fees on the ground that they had not prevailed. Zinser and Spearman by their post-trial motion requested that their cases be transferred back to the United States District Court for the Northern District of Texas. This request was also denied.

Finally, a request was made that the trial court vacate a protective order entered on January 4, 1974. That order precluded all the named parties and counsel from initiating any communication with the class members without the prior permission of the court.[7] This order was apparently entered by consent of all parties. In his post-trial motion counsel for the plaintiffs asked that the order be rescinded so that the members of the three classes could be advised as to the current status of the case. The trial court denied this request.

The defendants also filed a post-judgment motion under Rule 59(e) and 60(a), requesting clarification of the June 25, 1979, order. The trial court granted this motion and amended its earlier order to provide that the claims of all members who did *not* sell directly to any defendant were dismissed *with* prejudice, and that the claims of those who *did* sell directly to a defendant were dismissed *without* prejudice. Plaintiffs next filed a timely notice of appeal.

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7. All parties and their lawyers were ordered not to *initiate* any communication with potential and actual class members who were not named parties. The order, which was proposed by counsel for the defendants, specifically stated that the lawyers *were* permitted to communicate with prospective clients when the contact was initiated by the prospective client rather than the attorney. The order was aimed at preventing client solicitation.

As indicated at the outset, the central issue concerns the applicability of *Illinois Brick*. The appellants' basic position is that *Illinois Brick* simply does not apply. The trial court did not agree with this argument. Nor do we.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, *rehearing denied*, 393 U.S. 901 (1968), the precursor of *Illinois Brick*, the plaintiff, a shoe manufacturer, sought treble damages from the defendant, a manufacturer and distributor of shoe machinery. The plaintiff, who was a customer of the defendant, alleged that the defendant had monopolized the shoe machinery industry and unlawfully initiated the practice of only leasing some of its machinery to the plaintiff, rather than selling it outright to the plaintiff. As a result, according to the plaintiff, there was, in effect, an overcharge, which was the difference between what the plaintiff paid defendant in shoe machine rentals and what it would have paid had defendant been willing to sell the machines. 392 U.S. at 483-84.

The defendant in *Hanover Shoe* claimed that the plaintiff had suffered "no legally cognizable injury," since the plaintiff had passed on any illegal overcharge to its customers in the form of a higher price on its shoes. The District Court rejected this pass-on defense, and the Court of Appeals affirmed. On certiorari, the Supreme Court also affirmed. The Supreme Court held that when a buyer shows that the price paid by him is illegally high, and also shows the amount of such overcharge, he has made out a *prima facie* case of injury and damage under section 4 of the Clayton Act, and that the fact that the buyer may have later passed on the amount of the overcharge to his customers does not defeat his cause of action. In other words, a pass-on theory could not be used by way of defense.

In *Illinois Brick*, the plaintiffs attempted to use a pass-on theory by way of offense. There the plaintiffs, the State

of Illinois and 700 other governmental entities, claimed treble damages on the ground that the defendants had engaged in a price-fixing conspiracy. The plaintiffs' theory was that the defendants, concrete block manufacturers, overcharged "middlemen" to whom they sold their blocks, with the middlemen then passing on the overcharge to the plaintiffs, which had not dealt with the defendant.[8] Extending the rule of *Hanover Shoe* in what it believed to be a symmetrical fashion, the Supreme Court ruled that a pass-on theory could not be used offensively by an indirect purchaser against an alleged violator of antitrust laws.[9]

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8. The defendants in *Illinois Brick* manufactured concrete blocks and sold them primarily to masonry contractors. The masonry contractors, in turn, submitted bids to general contractors for the masonry portions of construction projects. The general contractors submitted bids to the plaintiffs, which were the State of Illinois and 700 other governmental entities, including counties and cities. 431 U.S. at 726.

The distributive chain in *Illinois Brick*, therefore, resembles that which often exists in the wheat industry, at least in the number of links in the distributive chain. The wheat farmers often sell to county grain elevator companies, which, in turn, sell to larger companies, which sell to the defendants. This is not always true, since, in some cases, farmers sell directly to the defendant grain companies. In other cases, farmers deal directly with farmer co-operatives. Also, the wheat sometimes is handled by only one middleman, who, in turn, deals with the defendants. As indicated, however, in many cases there are four links in the distributive chain, just as there are in the concrete block industry which was scrutinized in *Illinois Brick*.

9. Passing-on often means the process in which a buyer shifts all of an overcharge to the next link in the distributive chain. For example, a wholesaler who was overcharged by the manufacturer from whom he bought goods would simply add to the purchase price a certain amount to reflect mark-up for costs and profits. The resulting sum would be the price which the wholesaler would charge to the retailer to whom he sold the item. In this example, the overcharge is simply "passed on" from the wholesaler to the retailer, since it is reflected in the wholesaler's charge to his customer, the retailer.

The wheat farmers allege the converse of the above example. *I.e.*, instead of passing on an overcharge, those in the wheat distribution chain allegedly passed on an undercharge, or an artificially low price, which was the result of an illegal conspiracy between the defendants.

From *Illinois Brick*, we learn that in an antitrust treble damage case involving price-fixing the plaintiff must have dealt directly with the alleged violator. We recognize that in *Illinois Brick* the plaintiffs were buyers, whereas, in the instant cases, the plaintiffs are sellers. Such fact, however, does not render the rule of *Illinois Brick* inapplicable. In the instant cases, the claim is that, because the defendants violated antitrust laws, they were able to buy wheat at depressed prices from middlemen, and that the middlemen, in turn, purchased wheat from the plaintiffs at reduced prices. In *Illinois Brick*, an indirect purchaser could not recover for an overcharge which had been passed on to him. It logically follows that an indirect seller, i.e., one who did not deal with the defendant, may not recover for an undercharge set in motion by the indirect buyer's unlawful activities.

A case applying the general rule of *Illinois Brick* to a fact situation similar to the present one is In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), *rehearing denied*, 616 F.2d 659 (5th Cir.), *cert. denied*, Safeway Stores, Inc. v. Meat Price Investigators Assn., 101 S.Ct. 280-81 (1980). There the plaintiffs were ranchers and feeders, or both. The defendants were twenty-five retail food chains, a wholesale grocer, the retail chains' national trade association, and a beef industry price reporting publication. The plaintiffs alleged that the defendants combined to fix at artificially low levels the prices at which they purchased beef from slaughterhouses and meat packers, which in turn, caused the plaintiffs to receive less for their cattle sold to the meat packers. Although the plaintiffs did not deal directly with any defendant, it was their theory that they received less for their cattle which they sold to the slaughterhouses because of the defendants' antitrust activity.

In *Beef Industry*, as here, the plaintiffs' basic position was that *Illinois Brick* simply had no application. The Fifth Circuit rejected this argument and held that the general rule of *Illinois Brick* did apply, and that such would bar the plaintiffs, none of whom had sold cattle to any defendant, from recovery in an antitrust action. We recognize that the Fifth Circuit went on to hold that the plaintiffs came within an exception to the *Illinois Brick* rule. However, in our view, the plaintiffs in the present case do not come wthin any exception to the rule. The relevance of *Beef Industry* is that the rule of *Illinois Brick* precludes an antitrust action by a seller who alleges price-fixing by a defendant with whom he has not dealt directly, unless the seller can bring himself within some exception to the general rule.

As indicated, there are exceptions to the *Hanover-Illinois Brick* rule. In *Hanover Shoe*, the Supreme Court recognized that if the plaintiff in that case, who had dealt directly with the defendant, had a pre-existing cost-plus contract with its customer, then a pass-on theory of defense might be permitted. Similarly, in *Illinois Brick*, where the plaintiffs had not dealt with the defendants, the Supreme Court again recognized that if the plaintiffs in that case had a pre-existing cost-plus contract with the middlemen, which they did not, then the plaintiffs could have used the pass-on theory offensively, i.e., they would have had a cause of action against the defendants with whom they had no direct dealings. Also, in *Illinois Brick*, the Supreme Court further recognized that the pass-on theory might be permitted "where the direct purchaser is owned or controlled by its customer."

Recognizing that the Fifth Circuit in *Beef Industry* held that the plaintiffs came within an exception to the rule of *Illinois Brick*, we do not believe the plaintiffs in

the instant case have brought themselves within any such exception. In *Beef Industry*, the Fifth Circuit held that there was the "functional equivalent" to a pre-existing cost-plus contract. In thus holding, the Fifth Circuit relied on the allegation that in buying live cattle the packers strictly applied a set formula to a Yellow Sheet reflecting the defendants' wholesale beef prices. We find nothing comparable in the instant case. Be that as it may, the Supreme Court has indicated that exceptions to *Illinois Brick* are exceedingly narrow in scope, and, we believe, should be few in number. In our view, any exception should not be given an expansive application, lest it swallow the rule and become the rule itself.[10]

As indicated, in its order of June 25, 1979, the trial judge not only held that *Illinois Brick* applied to all who had not themselves dealt with Continental, but also refused to certify as a class those who had dealt directly with Continental. It is conceded that the question of whether those persons who sold to the defendants should have been certified as a class was a discretionary matter. Our study of the matter convinces us that the trial judge considered all relevant factors and did not abuse his discretion when he refused to certify.[11]

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10. In support of our strong belief that any exception to the rule of *Illinois Brick* should be narrow in scope, *see* Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3rd Cir. 1979). There the Third Circuit held that indirect purchasers of consumer bags could not recover treble damages from the manufacturer of the bags in the absence of proof that there were pre-existing fixed quantity, cost-plus contracts at each level of distribution between the direct purchasers from the defendant manufacturer and the plaintiffs, and that therefore the plaintiffs had absorbed the illegal overcharge in its entirety.

11. Fed. R. Civ. P. 23(a) provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3)

(Continued on following page)

By timely post-trial motions, the parties raised several matters, some of which apparently had not been previously urged. All were denied, and plaintiffs suggest that such action constitutes error.

Specifically, after the trial court had ruled that *Illinois Brick* applied, the plaintiffs sought leave to amend their pleadings so as to include claims based on fraud and deceit or civil conspiracy, with jurisdiction based on diversity. In this regard the plaintiffs assert that such claims were, in reality, already pleaded and amendment was not actually necessary. We do not agree.

The present causes of action were clearly based only on antitrust statutes, and the request to amend the pleadings to include claims based on state law was not made until after the trial court ruled that *Illinois Brick* applied. To

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Footnote continued—

the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Judge Daugherty found the classes should not be recertified because, *inter alia*, the vast majority of potential class members were eliminated as plaintiffs. Therefore, the number of direct sellers was not large enough to meet the numerosity requirement. Further, he found that the test for meeting that requirement is not one of numbers alone, "but rather a determination of impracticability of joinder." *See, e.g.*, Bennett v. United States, 266 F. Supp. 627 (W.D. Okla. 1965).

More importantly, since none of the named plaintiffs sold directly to the defendants, there were no class representatives. In the Oklahoma case, there apparently was no volunteer to replace Cleveland. While there apparently were proposed new class representatives in the other two cases, the court found that the proposed substitutes had not shown "that they would make adequate financial and other commitments to the actions or that they do not suffer from any conflicts of interests." So there were no class representatives for the proposed new classes and the lower court acted properly in refusing to certify.

See also Sosna v. Iowa, 419 U.S. 393, 403 (1975); Holt v. Moore, 541 F.2d 460, 462 (4th Cir. 1976); Britt v. McKenney, 529 F.2d 44, 45 (1st Cir.), *cert. denied*, Burden v. McKenney, 429 U.S. 854 (1976).

hold that the present complaints set forth not only claims for antitrust violations but also claims for fraud and deceit would reduce the rules of pleading to a shambles. Suffice it to say, the trial court did not abuse its discretion in refusing to allow the plaintiffs to amend their complaints so as to include additional and different claims. For seven years the matter had proceeded as an antitrust case, and it was too late to convert the present proceedings to something different. In *Beef Industry*, the Fifth Circuit also held that the trial court did not abuse its discretion in denying post-judgment motions to amend. *See also* Summit Office Park, Inc. v. United States Steel Corp., 639 F.2d 1278 (5th Cir. 1981), in which dismissal was based on *Illinois Brick* and the denial of a motion to amend was held not to constitute an abuse of discretion.

Other matters raised on appeal need not be considered in any detail. The trial court did not err in refusing to transfer the Zinser and Spearman cases back to the Northern District of Texas. This request was only made after the handwriting was on the wall. Similarly, the trial court did not err in denying plaintiffs' request for attorney fees.

Because of a recent Supreme Court decision, one final matter requires comment. As indicated, the trial judge in 1974 entered a protective order requiring the named parties and counsel to obtain court permission before contacting members of the class. We are advised that such order was in accord with the practice at that time, and that there was no objection to the entry of such an order. However, in their post-judgment motion the plaintiffs asked that the order be lifted. The trial court denied the request, and the matter is raised on appeal.

In Gulf Oil Co. v. Bernard, 49 U.S.L.W. 4604 (June 1, 1981), the Supreme Court held that an order similar to

the one in the instant case was inconsistent with the general policies embodied in Fed. R. Civ. P. 23, and that any order of this type must be based on a "clear record and specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties." In view of *Gulf*, the protective order should not have been entered, and, upon subsequent request, should have been vacated. All of this, of course, is by way of hindsight. But to clear the record, that portion only of the trial court's judgment is reversed. In all other regards, the judgment is affirmed.

APPENDIX B

JULY TERM - September 4, 1981

Before Honorable Oliver Seth, Chief Judge, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

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No. 79-2310

EDGAR W. CLEVELAND, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972, until September 1, 1972,
Plaintiff-Appellant,

vs.

CLARENCE PALMBY; CONTINENTAL GRAIN COMPANY; CARGILL, INCORPORATED; LOUIS DREYFUS CORPORATION; COOK INDUSTRIES; GARNAC GRAIN COMPANY, and BUNGE CORPORATION,
Defendants-Appellees.

No. 79-2296

JOE ZINSER,
Plaintiff-Appellant,

vs.

CONTINENTAL GRAIN COMPANY,
Defendant-Appellee,

JOHN SPEARMAN,
Plaintiff-Appellant,

vs.

CONTINENTAL GRAIN COMPANY,
Defendant-Appellee.

This matter comes on for consideration of appellants' petitions for rehearing and suggestions for rehearing en banc in the captioned causes.

Upon consideration whereof, the petitions for rehearing are denied by the panel to whom the cases were argued and submitted.

The petitions for rehearing have been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing en banc are denied. Circuit Judge Holloway did not participate in the en banc proceedings.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX C

(Filed June 25, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

M.D.L. DOCKET NO. 129
(ALL CASES)
Civ. 72-731-D
Civ. 73-779-D
Civ. 73-780-D

IN RE:

WHEAT FARMERS ANTITRUST CLASS ACTION LITIGATION

ORDER

This is an antitrust action in which it is asserted that the Defendant grain companies conspired to fix the price of wheat paid to wheat farmers or producers at a low level by withholding from the public information regarding the sale of wheat to the Soviet Union in the summer of 1972. Plaintiffs allege that the Defendants knew prior to the time that Plaintiffs harvested and sold their wheat that the Soviet Union would buy large quantities of wheat in the United States and that this demand for wheat would drive up the price, and that the Defendants conspired to withhold this information from the public in order to keep the price at which Defendants could purchase wheat from the farmers at a level lower than that anticipated once the

announcement of the Soviet purchase was made. The Plaintiffs seek relief herein pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15, for losses they allegedly sustained when they sold their wheat on the open market during 1972 at a lower level than the market price should have been.

This litigation involves several cases which have been consolidated in this Court for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. §1407 relating to multidistrict litigation. The Plaintiffs in each case purport to represent a class of wheat farmers in a particular area who sold their wheat while the information of the wheat sales to the Soviet Union was purportedly suppressed. Plaintiff Cleveland purports to represent all Oklahoma wheat farmers; Plaintiff Zinser purports to represent the wheat farmers in certain counties of Texas primarily located in the area known as the Texas panhandle; and Plaintiff Spearman purports to represent the wheat farmers in Curry County, New Mexico. The Zinser and Spearman cases have been transferred to this Court from the Northern District of Texas. The pleadings in the cases contain basically identical allegations. Plaintiff Cleveland's action is brought pursuant to Section 4 of the Clayton Act alleging injury arising from alleged violations of Section 1 of the Sherman Act, 15 U.S.C. §1, by the Defendants claiming they entered into an agreement or conspiracy to fix prices. Plaintiffs Zinser and Spearman have adopted Cleveland's allegations with regard to the violations of Section 1 of the Sherman Act and have also added an allegation that Defendant Continental Grain violated Section 2 of the Sherman Act, 15 U.S.C. §2, by engaging in a monopoly. The only Defendants originally joined in all cases were Continental Grain Company and Clarence Palmby. Plaintiff Cleveland also joined as Defendants in his case

the grain companies, Cargill, Incorporated, Louis Dreyfus Corporation, Cook Industries, Garnac Grain Company, and Bunge Corporation.

On June 30, 1975, the Court certified the cases involved to be maintained as class actions on behalf of all wheat producers in designated areas who sold wheat on the open market from May 1, 1972 until September 1, 1972.[1]

Subsequent to the certification of the cases in this action as class actions, the United States Supreme Court decided *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). In *Illinois Brick*, the Supreme Court held that indirect purchasers, whose only claim of injury is that an illegal overcharge has been passed on to them, are not persons injured by an antitrust violation[2]

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1. As indicated in the Court's Order filed on June 30, 1975, the classes involved are as follows:

Cleveland - "All Oklahoma wheat farmers who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 43,000 farmers."

Zinser - "All wheat farmers in 34 designated counties in Texas located in the Texas Panhandle and adjacent areas of North Texas who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 12,000 farmers."

Spearman - "All wheat farmers in Curry County, New Mexico who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include between 600 and 1500 farmers."

2. In *Illinois Brick*, the Supreme Court refused to overturn its 1968 ruling in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), which severely restricted the circumstances in which the pass-on of illegal overcharges may be proved. While *Hanover Shoe* dealt with the defensive use of pass-on by a defendant trying to show that the plaintiff, the first purchaser, had suffered no actual injury, *Illinois Brick* applied the same principles to bar the offensive use of pass-on by an indirect purchaser seeking to establish that it, and not the first purchaser, was the party harmed. The Supreme Court thus rejected the offensive, as well as the defensive, use of the pass-on theory. *See generally*, Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Columbia L. Rev. 979, 998 (1977).

and cannot recover under Section 4 of the Clayton Act except in extremely limited circumstances.[3]

Upon study of the *Illinois Brick* decision, the Court tentatively concluded that the ruling in that case was applicable to this litigation. In a letter dated March 16, 1978, the Court informed the parties in this action that it appeared that the ruling in *Illinois Brick* suggested that a reconsideration of the certified classes in this litigation might be necessary and directed the plaintiff class representatives to file a statement with reference to whether their respective classes contained any direct sellers of wheat to a defendant grain company and the approximate number of such direct sellers in each class. The Court indicated that where there existed a viable class in a case and the present plaintiff class representative was not a member of the viable class, a substitution of the plaintiff class representative would appear to be appropriate and necessary.

An examination of the record reveals that none of the original plaintiff class representatives herein sold their wheat directly to the defendant grain companies during the time period involved in this action. By letter dated March 22, 1978, counsel in the Zinser case indicated that they expected to substitute Jack Williams as the plaintiff class representative in that case. By letter dated March 28,

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3. The Supreme Court in *Illinois Brick* noted the exception recognized in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, *supra*, "that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." *Hanover Shoe*, 392 U.S. at 494. *See Illinois Brick*, 431 U.S. at 735-36. It is also mentioned in *Illinois Brick* that "[a]nother situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." *Id.*, 431 U.S. at 736 n. 16.

1978, counsel in the Spearman case indicated that T. M. Borden might be substituted as the plaintiff class representative in that case. A substitute class representative has not been named and presented for the Cleveland case.

In a letter dated May 26, 1978, counsel for Continental Grain indicated that Continental Grain's records revealed that there were 62 members of the class in the Spearman case who sold wheat directly to Continental Grain; that not more than 212 members of the class in the Zinser case sold their wheat directly to Continental Grain; and that not more than 92 members of the class in the Cleveland case sold their wheat directly to Continental Grain.

On August 23, 1978, Plaintiffs Zinser and Spearman filed a Motion to Extend Time for Discovery in Determining All Members of the Class Who Sold Direct to Continental Grain Company Through the Member Farmer Cooperatives and to Determine a Correct List of the Parties Under the Court's Order. Plaintiff Cleveland has not joined in this motion. In connection with said motion, Defendant Continental Grain and Plaintiffs Zinser and Spearman have filed several letters, briefs and exhibits in support of their respective contentions.

In their motion, Zinser and Spearman first move the Court for permission to make and include as members of the class of farmers who sold wheat directly to Continental Grain the farmer cooperatives who handled the farmer's wheat during the relevant time period. In the alternative, they move the Court for the right to ascertain from the farmer cooperatives the names of the individual farmers who sold their grain to Continental Grain through farmer cooperatives. Zinser and Spearman contend that wheat farmers who sold their wheat to a defendant grain company through a farmer cooperative should be considered as di-

rect sellers to the grain companies so as to fall within the rule in *Illinois Brick* and that the farmer cooperatives, as the representatives and sellers of grain for the farmers, should be made members of the classes in this action, representing those farmers who owned the cooperatives and for whom they acted to sell wheat directly to the defendant grain companies.

The Court concludes that Zinser and Spearman's motion should be overruled. To the extent said motion requests an extension of time for additional discovery, the Court has already permitted such an extension. As Continental Grain has indicated those class members who sold wheat directly to it, there is no need for a further extension of time for additional discovery. Plaintiffs' request for the Court to consider the class members who sold wheat to a defendant grain company through a farmer cooperative to be direct sellers to the defendant grain companies is denied. Such a situation does not come within the narrow exceptions set forth in *Illinois Brick*. The Plaintiffs have not shown that there were pre-existing, fixed-quantity, cost-plus contracts at each level of distribution between the Defendants and the members of the classes herein. Nor have they shown that the entities to whom the wheat farmers directly sold their wheat were owned or controlled by the defendant grain companies. As an incorporated farmer cooperative is a legal entity separate and apart from its members, *see* 18 Am.Jur.2d *Cooperative Associations* §3 (1965), a wheat farmer who sells wheat to a cooperative which in turn sells the wheat to a grain company is an indirect seller of the wheat to the grain company and is precluded by the ruling in *Illinois Brick* from having a remedy under §4 of the Clayton Act. Plaintiffs' request that the Court make the farmer cooperatives who sold wheat directly to a defendant grain com-

pany a new class in this action is also denied. No cooperatives are named as members of the certified classes in this action nor have any cooperatives sought to intervene herein. Moreover, as any antitrust claims a farmer cooperative might have against the defendant grain companies arising out of the time period involved in this action may possibly be barred by the four-year antitrust statute of limitations, it would be inappropriate for the Court to add the cooperatives as members of the classes in this case.

Plaintiffs have on several occasions urged the Court to defer resolution of the application of *Illinois Brick* to this action pending possible legislative action to override *Illinois Brick*. It has now been over two years since the Supreme Court rendered its decision in *Illinois Brick*, yet no legislation has been enacted to override that decision. Given the present uncertain status of any such legislative efforts, the Court finds no basis for a further delay in determining the applicability of *Illinois Brick* to this litigation. *Illinois Brick* remains the law and, if appropriate, must be applied in this case.

The Court has conducted a hearing on the possible recertification of the classes in this action in light of *Illinois Brick*. Upon consideration of the arguments made by the parties at that hearing and in their various briefs relating to the matter, the Court concludes that the ruling in *Illinois Brick* is applicable to this litigation. In view of the ruling of the United States District Court for the Northern District of Texas in *In re Beef Industry Antitrust Litigation*, M.D.L. 248 (N.D. Tex., Dec. 9, 1977), where the *Illinois Brick* rule was applied in an antitrust case involving plaintiffs who were indirect sellers, the Court determines that the ruling in *Illinois Brick* bars recovery under Section 4 of the Clayton Act by an indirect seller as well as by an indirect purchaser.

Accordingly, in light of *Illinois Brick*, the Court must dismiss from the classes certified in these actions those class members who did not sell wheat directly to any of the defendant grain companies during the time period involved herein.

With regard to the recertification of the classes, Continental Grain contends that the remaining classes consisting of farmers who were direct sellers to a defendant grain company should not be recertified as they no longer meet the adequacy of representation or numerosity prerequisites for maintenance of a class action pursuant to Rule 23(a), Federal Rules of Civil Procedure. It maintains that the Cleveland case should be dismissed because of the lack of a class representative, as Cleveland is not a direct seller and no class member who was a direct seller has stepped forward as a proposed class representative in that case, and that the Zinser and Spearman cases should not be recertified as neither Zinser nor Spearman were direct sellers and that the proposed new class representatives in those cases are inadequate as they have not demonstrated that they would make adequate financial and other commitments to the actions or that they do not suffer from any conflicts of interest. Continental Grain further contends that the remaining potential classes should not be recertified as the number of direct sellers in these cases is not so large as to meet the numerosity requirement of Rule 23(a)(1), Federal Rules of Civil Procedure.

As the Court has concluded that those members of the classes involved in this action who did not sell their wheat directly to the defendant grain companies are to be excluded from the classes herein pursuant to the ruling in *Illinois Brick*, this will leave all three cases involved herein without a class representative. The information provided by Continental Grain indicates that during the time period

in question it purchased wheat directly from 62 class members in the Spearman case, not more than 212 class members in the Zinser case, and not more than 92 members of the class in the Cleveland case. There is no indication in the record as to the number of class members in the Cleveland case who sold their wheat directly to a defendant grain company other than Continental Grain.

In view of the effect of the ruling in *Illinois Brick* upon the size of the classes involved in this litigation, the Court has reevaluated the propriety of giving this litigation class action treatment.

As one of the prerequisites for maintaining a class action, subdivision (1) of Rule 23(a), Federal Rules of Civil Procedure, permits a class action only when "the class is so numerous that joinder of all members is impracticable." Although the number of class members is relevant, the language of the rule as construed emphasizes that this criterion is not a "numerousness test," but rather a determination of impracticability of joinder. 4 Newberg *Class Actions* §7512, at 9 (1977). The determination of practicability depends on all the circumstances surrounding the case, *Rex v. Owens ex rel. State of Oklahoma*, 585 F.2d 432, 436 (Tenth Cir. 1978), including the magnitude of claims and the degree of dispersion of the prospective plaintiffs. *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 45 (N.D. Cal. 1977).

In the present status of the case, the Court in its discretion finds that the cases involved in this litigation should not be maintained as class actions as it has not been sufficiently shown to the Court that the joinder or intervention of all who might be expected to join will be impracticable. Upon consideration of the limited geographic areas involved in each case, the short duration of the alleged conspiracy, the identity of the persons allegedly coerced, the

level of distribution affected by the alleged conspiracy, and the product involved, the Court concludes that the cases involved herein are no longer in such a posture as to warrant class action treatment.

The number of potential class members in each of the three cases is not so numerous as to make joinder impracticable or to make a class action any more likely to promote uniformity of decision than joinder. *See, e.g., Barcelo v. Brown,* 78 F.R.D. 531, 535 (D. P.R. 1978) (class action certification unnecessary where there were approximately 150 potential class members); *Aiello v. City of Wilmington, Del.,* 426 F.Supp. 1272, 1282-83 (D. Del. 1976) (250 potential class members are not so numerous as to make joinder impracticable); *United Steelworkers of America, Local 8024 v. Jarl Extrusions, Inc.,* 405 F.Supp. 302, 303 (E.D. Tenn. 1975), *aff'd,* 527 F.2d 648 (Sixth Cir. 1975) (joinder of 85 potential class members practicable); *Van Allen v. Circle K Corp.,* 58 F.R.D. 562, 564 (C.D. Cal. 1972) (149 potential class members would not create an unmanageable piece of litigation); *Minersville Coal Co. v. Anthracite Export Ass'n,* 55 F.R.D. 426, 428 (M.D. Pa. 1971) (330 potential class members are not so numerous as to make joinder impracticable); *City & County of Denver v. American Oil Co.,* 53 F.R.D. 620, 626 (D. Colo. 1971) (joinder of 126 potential class members practicable); *Utah v. American Pipe & Construction Co.,* 49 F.R.D. 17, 21 (C.D. Cal. 1969) (joinder of 350 plaintiffs practicable); *Bennett v. United States,* 266 F.Supp. 627, 629 (W.D. Okla. 1965) (potential claims of all residents and property owners in Oklahoma City not so numerous as to require a class action).

In addition, the geographic distribution of the direct sellers involved in each case, in that all such farmers in each case reside in the same general geographic area, is a factor weighing in favor of the practicability of joinder.

See DeMarco v. Edens, 390 F.2d 836, 845 (Second Cir. 1968); *Ewh v. Monarch Wine Co.*, 73 F.R.D. 131, 133 (E.D. N.Y. 1977); *Carr v. New York Stock Exchange, Inc.*, 414 F. Supp. 1292, 1304 (N.D. Cal. 1976).

In view of the foregoing, the Court is unable to conclude that class actions in the cases involved in this litigation, in their present posture, would achieve economies of time, effort and expenses or promote any more uniformity of decision than the use of joinder and intervention. *See* Notes of the Advisory Committee, 39 F.R.D. 73, 102-103 (1966).

Accordingly, Zinser and Spearman's Motion to Extend Time for Discovery in Determining All Members of the Class Who Sold Direct to Continental Grain Company Through the Member Farmer Cooperatives and to Determine a Correct List of the Parties Under the Court's Order is overruled in all aspects. And as the present Plaintiffs are barred from recovering herein by *Illinois Brick*, this action, to include all cases therein, is hereby dismissed without prejudice.[4]

It is so ordered this 25 day of June, 1979.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

JUDGMENT ENTERED ON JUNE 25, 1979

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4. Though the Court cannot make a ruling on the same, it would appear that the antitrust statute of limitations was tolled for the benefit of the class members during the period that the class actions involved in this litigation were certified. *See generally, Flanagan v. McDonnell Douglas Corp.*, 428 F.Supp. 770, 775 (C.D. Cal. 1977); 1 Newberg *Class Actions* §1010.1o (1977).

CERTIFICATE OF MAILING

This is to certify that a copy of the Order dismissing all three of the above named cases was mailed on 6-25-79 to:

H. Keith Myers
Stan P. Doyle
James A. Ikard
M. David Riggs
Frank Gregory
Judson S. Woodruff
Earnest Langley
Patricia D. Howard,

Herbert T. Hope, Clerk
By /s/ Vera Eddleman
Deputy Clerk

APPENDIX D

(Filed November 13, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

M.D.L. Docket No. 129
(ALL CASES)

IN RE:

WHEAT FARMERS ANTITRUST CLASS
ACTION LITIGATION

ORDER

This is an antitrust action in which it is asserted that the Defendant grain companies conspired to fix the price of wheat paid to wheat farmers or producers at a low level by withholding from the public information regarding the sale of wheat to the Soviet Union in the summer of 1972. Plaintiffs allege that the Defendants knew prior to the time that Plaintiffs harvested and sold their wheat that the Soviet Union would buy large quantities of wheat in the United States and that this demand for wheat would drive up the price, and that the Defendants conspired to withhold this information from the public in order to keep the price at which Defendants could purchase wheat from the farmers at a level lower than that anticipated once the announcement of the Soviet purchase was made. In their pleadings, the Plaintiffs seek relief herein pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, for losses they allegedly sustained when they sold their wheat on the

open market during 1972 at a lower level than the market price should have been.

This litigation involves several cases which have been consolidated in this Court for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 relating to multidistrict litigation. The Plaintiffs in each case purport to represent a class of wheat farmers in a particular area who sold their wheat while the information of the wheat sales to the Soviet Union was purportedly suppressed. Plaintiff Cleveland purports to represent all Oklahoma wheat farmers; Plaintiff Zinser purports to represent the wheat farmers in certain counties of Texas primarily located in the area known as the Texas panhandle; and Plaintiff Spearman purports to represent the wheat farmers in Curry County, New Mexico. The Zinser and Spearman cases have been transferred for pretrial proceedings to this Court from the Northern District of Texas. The pleadings in the cases contain basically identical allegations. Plaintiff Cleveland's action is brought pursuant to Section 4 of the Clayton Act alleging injury arising from alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, by the Defendants claiming they entered into an agreement or conspiracy to fix prices. Plaintiffs Zinser and Spearman have adopted Cleveland's allegations with regard to the violations of Section 1 of the Sherman Act and have also added an allegation that Defendant Continental Grain violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in a monopoly. The only Defendants originally joined in all cases were Continental Grain Company and Clarence Palmby. Plaintiff Cleveland also joined as Defendants in his case the grain companies Cargill, Incorporated, Louis Dreyfus Corporation, Cook Industries, Garnac Grain Company and Bunge Corporation.

On June 20, 1975, the Court certified the cases involved to be maintained as class action on behalf of all wheat producers in designated areas who sold wheat on the open market from May 1, 1972 until September 1, 1972.[1]

On June 25, 1979, the Court entered an Order wherein it found that *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), was applicable to the instant action, and that the ruling in *Illinois Brick* thus barred recovery under Section 4 of the Clayton Act by the members of the classes in this action who did not sell their wheat directly to any of the defendant grain companies during the pertinent time period. In addition, in view of the effect of the application of the *Illinois Brick* ruling upon the size of the classes involved in this litigation, the Court reconsidered the certification of those classes and concluded that the cases involved in this action should not be maintained as class actions as it had not been sufficiently shown that the classes involved were so numerous that joinder of all members was impracticable. On this basis, the Court dismissed this action without prejudice.

The action is now before the Court on various motions by the parties. The Court rules on these motions as follows:

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1. As indicated in the Court's order filed on June 30, 1975, the classes involved are as follows:

Cleveland - "All Oklahoma wheat farmers who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 43,000 farmers."

Zinser - "All wheat farmers in 34 designated counties in Texas located in the Texas Panhandle and adjacent areas of North Texas who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 12,000 farmers."

Spearman - "All wheat farmers in Curry County, New Mexico who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include between 600 and 1500 farmers."

PLAINTIFFS' MOTIONS

All Plaintiffs have filed multiple motions[2] wherein they seek to have the Court set aside or amend its Order of June 25, 1979. The Defendants have responded to these motions and the parties have filed briefs, affidavits and letters in support of their respective contentions.

In their motions, Plaintiffs first move the Court to set aside its Order of June 25, 1979, on the ground that said Order was contrary to the law as the application of *Illinois Brick* to this case was improper. They contend that *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (Third Cir. 1979), and *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (Fifth Cir. 1979), established that *Illinois Brick* does not apply in this case.

The Defendants contend that the Plaintiffs' instant motion should be denied as the Court has already thoroughly considered the application of *Illinois Brick* to this case.

Upon examination of the Plaintiffs' motions and briefs, and the aforementioned decisions, the Court is not persuaded to alter its decision that the ruling in *Illinois Brick* is applicable to this case.

As noted by the Defendants in their response to Plaintiffs' present motions, the Third Circuit's decision in *Mid-West Paper Products Co. v. Continental Group, Inc., supra,*

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2. Plaintiff Cleveland has filed a Motion for New Trial, Motion to Vacate Judgment or Amend Judgment, Motion to Amend and a Motion for Oral Argument. Plaintiffs Zinser and Spearman have filed Plaintiffs' Motion Under Rule 59(e) of the Federal Rules of Civil Procedure to Alter or Amend the Court's Order of June 25, 1979 and Plaintiffs' Supplemental Motion Under Rule 59 of the Federal Rules of Civil Procedure for New Trial and To Alter or Amend the Court's Order of June 25, 1979. All of the Plantiffs indicate that they adopt all of the motions filed by the other Plaintiffs. In view of this, the Court will treat each motion as having been made by all Plaintiffs.

was brought to this Court's attention prior to the Court's Order of June 25, 1979. Under its initial examination of the *Mid-West Paper Products Co.* decision, the Court concluded that it did not support the Plaintiffs' argument that *Illinois Brick* was inapplicable to this case. A further examination of that case has not persuaded the Couht otherwise.

Nor does the Fifth Circuit's decision in *In re Beef Industry Antitrust Litigation, supra,* control this case. In its June 25, 1979, Order, this Court referred to the ruling of the United States District Court for the Northern District of Texas in *In re Beef Industry Antitrust Litigation,* M.D.L. 248 (N.D. Tex., Dec. 9, 1977), as supporting this Court's determination that the ruling in *Illinois Brick* barred recovery under Section 4 of the Clayton Act by an indirect seller as well as by an indirect purchaser. Although the district court's order dismissing the actions in the *In re Beef Industry Antitrust Litigation* was reversed by the Fifth Circuit on the basis that the plaintiffs' complaints therein stated claims for damages within the "cost-plus" exception to the *Illinois Brick* ruling, the Fifth Circuit agreed with the district court that *Illinois Brick* applies to price-fixing suits brought by sellers against indirect purchasers. *See* 600 F.2d at 1158-59. The Fifth Circuit's decision in *In re Beef Industry Antitrust Litigation* that that action comes within an exception to *Illinois Brick* does not govern this case as, unlike *In re Beef Industry Antitrust Litigation,* the Plaintiffs' pleadings in this action do not allege facts that can bring this case within the "cost-plus" exception to the *Illinois Brick* rule. When the Plaintiffs raised this argument prior to the Court's Order of June 25, 1979, the Court permitted the Plaintiffs to attempt to establish the existence of any "cost-plus" contracts. Plaintiffs failed at that time to show the Court that such contracts existed in this case

and have not persuaded the Court otherwise in their pending motions.

Accordingly, Plaintiffs' motions to have the Court's June 25, 1979, Order set aside on the basis that the ruling in *Illinois Brick* does not apply to this case are denied.

Plaintiffs next move the Court to permit them to amend their pleadings to name their cause of action as one for either the common law tort of fraud and deceit or statutory fraud and deceit under Oklahoma law (Plaintiff Cleveland) or civil conspiracy (Plaintiffs Zinser and Spearman). They assert that they have pleaded the requisite elements for those causes of action, and that this Court has authority at this time to permit Plaintiffs to amend their pleadings as requested pursuant to Rule 15(a), Federal Rules of Civil Procedure. They further contend that the Defendants herein cannot be prejudiced by the Court's permitting the Plaintiffs to amend as the transactions alleged in their pleadings as giving rise to their allegations of antitrust violations are the identical transactions and facts giving rise to their actions for fraud and deceit or civil conspiracy; that there has been no bad faith or unreasonable delay in their request to amend as they were not appraised of the remedy in question until only a few days before the Court's Order of June 25, 1979; and that under the facts pleaded by the Plaintiffs, the Court itself should have recognized that if the Plaintiffs were not entitled to the antitrust damages sought, they were entitled to some relief.

The Defendants urge the Court to overrule Plaintiffs' instant motions on the basis that the proposed amendments raise substantial new issues of law, fact and jurisdiction which were never previously part of this case and which would generate new motions, require new discovery, and set this case back to its beginning. Defendants assert that

the cases in this action have been antitrust cases since their inception, in that the Plaintiffs' pleadings invoked only the antitrust laws, the class discovery involved only antitrust issues, the classes were certified on the basis of the antitrust laws, and that all discovery, motions and arguments involved only the antitrust laws; that the proposed amendments would require starting from scratch and would involve new motions to the Plaintiffs' pleadings, as amended, and the reexamination of the class issues; that the requested amendment would severely prejudice the Defendants, who have been put to the heavy burden and expense of litigating this action once and should not be forced to do so again; and that the proposed amendments will be futile as Zinser and Spearman's amendment does not state a claim upon which relief can be granted. Defendants further contend that the Plaintiffs should be denied leave to amend as this action has been fully litigated for seven years; final judgment has been entered; the facts underlying the Plaintiffs' new claims were known to the Plaintiffs at the outset of the action; the law allegedly underlying those claims has existed since the outset of the action; Plaintiffs have shown no basis for the lengthy delay between the commencement of this action and Plaintiffs' proposed amendment; and Plaintiffs have not met their heavy burden to justify the delay.

The Court finds that the Plaintiffs' motions to amend should be denied. In this litigation, judgment in favor of the Defendants was entered on June 25, 1979. Under these circumstances, an amendment to the Plaintiffs' pleadings cannot be allowed until the June 25, 1979 judgment is set aside or vacated under Rules 59 or 60, Federal Rules of Civil Procedure. 6 Wright & Miller, *Federal Practice and Procedure*: Civil § 1489, at 445 (1971), and the cases cited therein. Wright & Miller sets out the rationale for this rule as follows:

> Although Rule 15(a) vests the district judge with virtually unlimited discretion to allow amendments by stating that leave to amend may be granted when "justice so requires," there is a question concerning the extent of this power once a judgment has been entered or an appeal has been taken. Most courts faced with the problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or 60. The party may move to alter or amend the judgment within ten days after its entry under Rule 59(e) or, if the motion is made after that ten day period has expired, it must be made under the provisions in Rule 60(b) for relief from a judgment or order. This approach appears sound. To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation. Furthermore, the draftsmen of the rules included Rule 59(e) and 60(b) specifically to provide a mechanism for those situations in which relief must be obtained after judgment and the broad amendment policy of Rule 15(a) should not be construed in a manner that would render those provisions meaningless. (Footnotes omitted.)

As the Court has already indicated in this Order, the Plaintiffs have not shown the Court that the judgment entered herein on June 25, 1979 should be vacated or set aside. The Court is thus without authority at this time to allow the Plaintiffs to amend their pleadings to change the theory on which their actions are based.

Moreover, even if the Plaintiffs' motions to amend could be considered at this stage of the litigation, the same should be denied. Where almost seven years have elapsed

since the commencement of the cases involved in this litigation, and the proposed amendments would change substantially the gist of the proceedings, the Court finds that justice would not be promoted by the proposed amendments. *See, e.g., Doe v. McMillan,* 566 F.2d 713, 720 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed.2d 59 (1978). As the *Illinois Brick* ruling was issued in June, 1977, and the Court did not enter its Order dismissing this action until June, 1979, the Plaintiffs had more than a reasonable opportunity since the *Illinois Brick* ruling to amend their pleadings. While Rule 15(a), Federal Rules of Civil Procedure, requires that leave to amend is to be freely granted "when justice so requires," the United States Supreme Court has said that motions to amend may properly be denied when there has been undue delay in moving for leave to amend. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). In this case, the Plaintiffs' motions indicate that the proposed amendments are not based on facts and evidence unearthed during the discovery process but that the same were known to the Plaintiffs at the time their cases were commenced. Since the commencement of the cases involved herein in 1972 and 1973,[3] the Plaintiffs have proceeded in this litigation solely on the theory that the Defendants have violated the antitrust laws, and the parties have completed discovery solely focusing on the alleged antitrust violations. The Plaintiffs offer no credible explanation for their failure to move for leave to amend their pleadings until almost seven years have passed since the commencement of this litigation and over two years after the *Illinois Brick* decision and nearly 18 months after the Defendants moved for dismissal on the

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3. Plaintiff Cleveland's Complaint in Case No. CIV-72-731-D was filed on October 24, 1972. Plaintiff Sinser's original Complaint in Case No. CIV-73-779-D was filed on November 16, 1972. Plaintiff Spearman's original Complaint in Case No. CIV-73-780-D was filed on January 2, 1973.

basis of *Illinois Brick*. Absent any explanation for such an undue delay, and in view of the prejudice to Defendants that the Plaintiffs' delay in seeking the requested amendments would cause, the Court finds that the interests of fairness and justice to both parties are best served at this stage of the litigation by avoiding the additional discovery and trial preparation which the Plaintiffs' proposed amendments would require. The additional theories which the Plaintiffs seek to include by their amendments do not represent new areas of the law that could not have been developed further and incorporated into this litigation at an earlier date. While leave to amend is to be given freely, this does not mean that it can go on indefinitely. *DeBry v. Transamerica Corp.*, 601 F.2d 480, 492 (Tenth Cir. 1979).

Accordingly, Plaintiffs' motions to amend are denied. *See generally, In re Beef Industry Antitrust Litigation, supra*, 600 F.2d at 1161-1163.

Pursuant to Rule 59(e), Federal Rules of Civil Procedure, plaintiffs next move the Court to alter or amend its Order of June 25, 1979, and permit them to show their costs and reasonable attorneys' fees, which Plaintiffs contend they should be permitted to recover "in right, justice and equity." In this connection, Plaintiffs submit that

> *Illinois Brick* was not the law when these cases were filed and that plaintiffs have been successful in establishing a class which has been found and determined by this Court to exist, and plaintiffs have taken depositions and made discovery which have been filed with this Court which shows the liability of the defendant and certainly makes a jury question. The Court certified the cases involved to be maintained as a class action on June 30, 1975, after class discovery, and prior to the *Illinois Brick* case in 1977, plaintiffs had

made complete discovery and stood ready for trial, and except for *Illinois Brick* and the Court's consideration thereof, the causes could have or would have proceeded to trial before this date, and in right, justice and equity, plaintiffs are entitled to their costs and reasonable attorneys' fees.

Defendants respond that there is no basis for an award of fees to the Plaintiffs' counsel.

The Court agrees with the Defendants. Under the American Rule, attorney fees are not ordinarily recoverable in the absence of a statute or an enforceable contract. *E.g., Christianburg Garment Co. v. EEOC,* 434 U.S. 412, 415, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978); *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In their motions, the Plaintiffs have not cited any statutory authority for them to be awarded their attorney fees under the circumstances of this action. Although Section 4[4] of the Clayton Act indicates that "the cost of suit, including a reasonable attorney's fee" can be awarded in an antitrust suit, an award of attorneys' fees under this section can be made only as incident to the successful prosecution of a law action for recovery of damages based on a violation of the antitrust laws. *Detroit v. Grinnell Corp.,* 495 F.2d 448, 459 (Second Cir. 1974); *Byram Concretanks, Inc. v. Warren Concrete Products Co.,* 374 F.2d 649, 651 (Third Cir. 1967); *see* Annot., Allowance of Attorneys' Fees Under § 4 of Clayton

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4. The full text of this section, 15 U.S.C. § 15, is as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Act (15 USCS § 15), Authorizing Award of "Reasonable Attorney's Fee" as Part of Costs Recoverable in Private Antitrust Treble-damage Suit, 21 A.L.R.Fed. 750 (1974), and the cases cited therein in §§ 5 and 6. In view of the Court's Order of June 25, 1979, the Plaintiffs have not been successful in this action and thus are not entitled to recover attorneys' fees under Section 4 of the Clayton Act.

The Plaintiffs have not established any enforceable contract whereby they are entitled to recover their attorney fees.

Nor have they shown that they come within any of the exceptions to the American Rule. Although Rule 23, Federal Rules of Civil Procedure, does not make any reference to the power of the Court to award attorneys' fees in a class action and the usual rule is that they are not taxable costs, the Court has discretion to order appropriate reimbursement to the successful representatives in a class suit on the basis that the class action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts. 7A Wright & Miller, *Federal Practice and Procedure*: Civil § 1803, at 284-285 (1972). As the Plaintiffs have been unsuccessful in this litigation, there has not been a common benefit achieved here to justify an allowance under that exception to the American Rule. *See Gottesman v. General Motors Corp., supra.*

Accordingly, Plaintiffs' motions for the Court to alter or amend its June 25, 1979, Order to allow them their costs and attorney fees are denied.

Plaintiffs Zinser and Spearman next move the Court to vacate its Order of June 25, 1979 and transfer their cases to the United States District Court for the Northern District of Texas, Amarillo Division, with the Court's ad-

vice as to the disposition to be made of the cases. Said Plaintiffs provide no authority for such a motion but assert that as these cases were originally filed in the Northern District of Texas, the law applicable to these cases on appeal is the law of the Fifth Circuit and the cases should thus be appealed to the Fifth Circuit. They assert in their supporting brief that "the court of original jurisdiction within the Fifth Circuit appellate district, where local discovery should be had, should be the court to make a final determination in this case, and that the ends of justice would be best served by the granting of this motion."

Defendants respond that the instant motion to transfer is frivolous. They contend that this action cannot be transferred to any other federal district court as final judgment has been entered and there is nothing left to transfer on the district court level. Defendants submit that what Plaintiffs Zinser and Spearman are seeking is a transfer to the Fifth Circuit for purposes of appeal, and state that such a request was rejected in *Utah v. American Pipe & Construction Co.*, 316 F.Supp. 837 (C.D.Cal. 1970).

Plaintiffs Zinser and Spearman's motion to return their cases to the Northern District of Texas for purposes of appeal is denied as only the United States Court of Appeals for the Tenth Circuit has the authority to review the decision of this Court in the instant litigation. *See Utah v. American Pipe & Construction Co., supra;* Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D. 575, 578 (1978).

Plaintiffs next move the Court to reconsider its decision in the Order of June 25, 1979, that the direct sellers in this action do not themselves constitute a sufficient class. They request a hearing wherein they would be permitted to show the Court that a class should be established

comprised of the direct sellers to the Defendants. They state that motions were filed in the *Cleveland* (should be *Zinser*) and *Spearman* cases in the federal district court for the Northern District of Texas to consolidate both cases for trial; that these motions are still pending in that court; and that if this Court does not find it proper to permit the Plaintiffs herein to introduce evidence concerning the establishment of a class, it should at least revise its Order of June 25, 1979, and "transfer that portion of the original case which involves the direct sellers to Continental back to the court where both cases were originally filed and permit the court for the Northern District of Texas to pass upon this phase of the case."

Defendants contend that the Plaintiffs' effort to reargue the numerosity issue should be rejected as the Plaintiffs have cited no authority for such a reconsideration.

Plaintiffs' motions for the Court to reconsider its decision that the cases involved herein should not be maintained as class actions should be denied. After a hearing on the matter, the Court fully considered the propriety of giving this litigation class action treatment, and in its Order of June 25, 1979, determined that it has not been sufficiently shown that the joinder or intervention of all of the direct sellers involved in this action would be impracticable. Plaintiffs' instant motions have not persuaded the Court that such a determination was incorrect.

Accordingly, Plaintiffs' motions for the Court to reconsider its decision that the direct sellers in this action are not sufficient to constitute a class are denied. Plaintiffs' motions are also denied to the extent they request a hearing on this matter and the transfer of their cases to the Northern District of Texas.

Plaintiffs next move the Court to reconsider its Order of June 25, 1979, and to alter or amend such Order on the

basis that, as argued by Plaintiffs Zinser and Spearman, "[t]he affidavits of independent grain dealers selling farmers' grain to Continental Grain Company, on file in this proceeding, show that such independent grain dealers were controlled in prices by Continental Grain Company, and being controlled by Continental Grain Company and the prices it fixed for grain sold to Continental is an outright exception to *Illinois Brick*."

Defendants respond that the Court has already considered this issue and that there is no need for it to now reconsider the matter.

Plaintiffs' instant motions should be denied. The Court has already fully considered whether this litigation comes within the narrow exceptions set forth in *Illinois Brick* and, in its Order of June 25, 1979, has concluded that this action does not fall within such exceptions. Plaintiffs' instant motions do not persuade the Court that such a determination was erroneous.

Accordingly, Plaintiffs' motions for the Court to reconsider its June 25, 1979, Order with regard to the application to this case of the exception mentioned in *Illinois Brick* "where the direct purchaser is owned or controlled by its customer," *see* 431 U.S. at 736 n. 16, are denied.

Plaintiffs further move the Court pursuant to Rule 59, Federal Rules of Civil Procedure, to withdraw its June 25, 1979 Order "in order to consider the matter of permitting plaintiffs and plaintiffs' attorneys to communicate with the plaintiffs as members of the original class, or, if it is the opinion of the Court that since the Order of June 25, 1979, has been entered, that the named plaintiffs and plaintiffs' attorneys are not further bound by the rule concerning communication with members of the class, then that the Court so specify or advise." Plaintiffs contend that they

owe a duty and obligation to the members of the class to discuss the case with them and to inform them of the Court's action, their rights as far as appeal is concerned, and the filing of independent suits, and assert that they cannot discharge this duty and obligation without them being permitted to communicate with such class members, and that any such "gag" order is an infringement upon their First Amendment rights and an undue restraint upon the rights, duties and obligations of Plaintiffs' counsel. Plaintiffs state that in imposing the protective order in this case, the Court simply maintained the local court rule of the United States District Courts of the Northern District of Texas, which local court rule the Plaintiffs state has been rescinded. Plaintiffs urge this Court "to certainly repeal the rule as it applies to the wheat cases at this time, and particularly in light of the action of the court where the cases were originally filed."

Defendants respond that the Plaintiffs' instant motion should be denied as it is untimely, in that it was not made within the 10-day time period set forth in Rule 59(e); that the Plaintiffs are apparently seeking to be released from the Court's order regulating class communications in order to solicit the representation of former class members in potential new actions and that such solicitation is expressly prohibited by the Court's order as well as by the recommendations of the Manual for Complex Litigation, and is ethically improper; that the Plaintiffs' argument that the Court's order regulating class communications should be vacated because the local court rule for the federal district courts in the Northern District of Texas has been revoked is without merit, in that the Court's order was based not on the local court rule in the Northern District of Texas but the rule and sample order contained in the Manual for Complex Litigation; and that the Court's judgment entered herein on June 25, 1979, does not relieve

the Plaintiffs or their counsel of their obligation not to engage in improper communications with former class members as said judgment does not affect counsel's basic ethical obligation not to solicit clients nor the obligations of Plaintiffs and their counsel under the Court's Order of January 4, 1974, as the potential for abuse in this litigation is still present.

As these actions have not been finally closed, as appeals are possible and seem likely, the Court is aware of no reason why the principles underlying the protective order of January 4, 1974, should not continue to be applicable to finality of this litigation.

In view of the foregoing, all of the Plaintiffs' motions are denied. As the Court is able to fully consider and rule on said motions upon the motions and Defendants' responses thereto, and the parties' briefs and letters in support thereof, the Court finds that it is not necessary for it to conduct oral arguments on said motions. Plaintiffs' Motions for Oral Argument are thus denied.

DEFENDANTS' MOTION TO CORRECT AND CLARIFY THE COURT'S ORDER AND JUDGMENT OF JUNE 25, 1979.

Pursuant to Rules 59(e) and 60(a), Federal Rules of Civil Procedure, the Defendants move the Court to correct and clarify its Order and Judgment of June 25, 1979, to provide clearly that the claims of all members of the classes involved in this litigation who did not sell wheat directly to any Defendant during the applicable time period are dismissed with prejudice and that the claims of all members of the classes who sold wheat directly to any Defendant during the applicable time period are dismissed without prejudice.

Plaintiffs respond that the Court should not amend its Order as requested by the Defendants on the basis that it "would be unjust and inequitable, under the facts of this case, to dismiss Plaintiffs' cause of action with prejudice, as such action could deprive Plaintiffs of their rights to refile and could have the effect of failing to toll the statute of limitations." Plaintiffs contend that their pleadings in the cases involved in this litigation are broad enough to allege common law torts as well as antitrust violations, and that any dismissal of their antitrust actions should be without prejudice to their right to amend their pleadings or to refile their actions so as to allege their common law torts.

Upon consideration of the Defendants' Motion to Correct and Clarify the Court's Order and Judgment of June 25, 1979, the Court finds that said Motion should be granted. Acordingly, the Court's Order and Judgment entered herein on June 25, 1979, should be amended to show that the claims of all members of the classes involved in this litigation who did not sell wheat directly to any of the Defendants during the applicable period of time are dismissed with prejudice, and the claims of all members of the classes who did sell wheat directly to any of the Defendants during the applicable period are dismissed without prejudice.

It is so ordered this 13th day of November, 1979.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

M.D.L. Docket No. 129
(All Cases)
CIV-72-731-D
CIV-73-779-D
CIV-73-780-D

IN RE:

WHEAT FARMERS ANTITRUST CLASS ACTION LITIGATION

AMENDMENT TO JUDGMENT

The Court having issued its Order on June 25, 1979, and Judgment having been entered thereon on June 25, 1979, and defendants having moved by Motion, dated July 3, 1979, to amend the Judgment, the Court finds that said Motion should be granted.

It is therefore Ordered that the Judgment entered herein on June 25, 1979, is amended as follows:

1. The claims of all members of the classes, conditionally certified pursuant to order dated June 30, 1975, in each of the five consolidated cases herein, who did not sell wheat directly to any of the defendants during the applicable period are dismissed with prejudice; and

2. The claims of all members of the classes who did sell wheat directly to any of the defendants during the applicable period are dismissed without prejudice.

Dated this 13 day of November, 1979.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

ENTERED IN JUDGMENT DOCKET ON NOV. 13, 1979